UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:		
	:	Case No. 3:12-cv-00176
Linda J., Koogle,		
	:	Judge Walter H. Rice
Debtor,		
	:	
Jeffery M. Kellner, Chapter 13 Trustee,		
	:	
Plaintiff-Appellee		Bankruptcy Case No. 11-30562
v.	:	(Adv. Pro. No. 11-3269)
City of Kettering, Ohio,	:	
Defendant-Appellant.	:	

DECISION AND ENTRY REVERSING THE UNITED STATES BANKRUPTCY COURT'S "DECISION GRANTING THE CHAPTER 13 TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING CITY OF KETTERING'S CROSS-MOTION FOR SUMMARY JUDGMENT"; REMANDING CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; TERMINATION ENTRY OF APPEAL

The City of Kettering ("The City") appeals the March 26, 2012, decision of the United States Bankruptcy Court for the Southern District of Ohio, granting summary judgment in favor of the Appellee, Chapter 13 Bankruptcy Trustee Jeffery M. Kellner. This Court exercises appellate jurisdiction in this matter pursuant to 28 U.S.C. § 158(a)(1). For the reasons set forth below, the Court

REVERSES the decision of the Bankruptcy Court and REMANDS the case for further proceedings consistent with this opinion.

I. Background and Procedural History

The City of Kettering offers home improvement loans to residents who are low-income, over 65 years of age, or disabled. Payment on these loans is deferred until the property is transferred. In accordance with this program, on April 29, 2005, Linda J. Koogle borrowed $21,544 from the City. To secure the loan, Koogle granted a Mortgage to the City. That Mortgage specifically identifies her as the sole "Mortgagor."

Koogle's signature on the Mortgage was witnessed by Tom Luckett, Jr., and Constance L. Caslin. Caslin, a notary public, also notarized Koogle's signature. Unfortunately, the acknowledgment clause, which Caslin signed and to which she affixed her seal, contained a typographical error. Instead of naming Koogle, it read, "[b]efore me, a notary public in and for said county, personally appeared the above-named Mortgagor, Steven R. Cummings, and acknowledged the signing and sealing of the forgoing conveyance to be the voluntary act and deed of the Mortgagor, for the uses and purposes therein expressed." Ex. A to Caslin Aff.

It is undisputed that Steven R. Cummings was not "the above-named Mortgagor," is not mentioned anywhere else in the Mortgage, and did not sign the Mortgage in question. Despite this obvious error, the Mortgage was recorded with the Montgomery County Recorder.

On February 8, 2011, Koogle filed a voluntary petition for Chapter 13 bankruptcy protection. Jeffery M. Kellner was appointed Trustee. The Bankruptcy Code allows a bankruptcy trustee to "avoid . . . any obligation incurred by the debtor that is voidable by . . . (3) a bona fide purchaser of real property . . . from the debtor . . . whether or not such a purchaser exists." 11 U.S.C. § 544(a)(3). Under Ohio law, only a properly executed mortgage can take priority over a bona fide purchase; "an improperly executed mortgage does not put a subsequent bona fide purchaser on constructive notice" of the security interest at stake. *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1028 (6th Cir. 2001).

Pursuant to his authority under § 544(a)(3), the Trustee commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of Ohio seeking to avoid the Mortgage. He argued that the erroneous insertion of the name Steven R. Cummings in the acknowledgment clause, in place of Koogle's name, rendered the Mortgage invalid and voidable under Ohio law.

The Bankruptcy Court agreed. On March 26, 2012, it issued an order granting summary judgment in favor of the Trustee, and denying the City's cross-motion for summary judgment. The Bankruptcy Court found that because the Mortgage was not in substantial compliance with Ohio law, it could be avoided by the Trustee. The City now appeals that ruling and, in accordance with Rule 8001 of the Federal Rules of Bankruptcy Procedure, has elected to have its appeal heard by this Court rather than a bankruptcy appellate panel. For the reasons discussed herein, this Court finds that the Bankruptcy Court erred in holding that the Mortgage was not in substantial compliance with the statutory requirements.

II. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this case, the material facts are not in dispute. The issue of whether the erroneous substitution of Cummings' name in the acknowledgment clause rendered the Mortgage invalid is purely a question of law, which is reviewed *de novo* on appeal. *Treinish v. Norwest Bank Minn., NA* (*In re Periandri*), 266 B.R. 651, 653 (B.A.P. 6th Cir. 2001).

III. Analysis

A. Statutory Requirements for a Properly Executed Mortgage

In order to be considered valid, "a mortgage must be executed in conformity with the statutory requirements of Ohio law." *Noland v. Burns (In re Burns)*, 435 B.R. 503, 508 (Bankr. S.D. Ohio 2010). The requirements for a properly executed mortgage are set forth in Ohio Rev. Code § 5301.01(A) as follows:

> A . . . mortgage . . . shall be signed by the . . . mortgagor. . . . The signing shall be acknowledged by the . . . mortgagor . . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the

> acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

The certificate of acknowledgment must contain the words "acknowledged before me" or their substantial equivalent. Ohio Rev. Code § 147.54(C). The approved "short form" acknowledgment states: "The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged)." Ohio Rev. Code § 147.55(A). "Acknowledged before me" means that:

> (A)The person acknowledging appeared before the person taking the acknowledgment; (B) He acknowledged he executed the instrument . . . (C)(1) for the purposes therein stated . . .; and (D) The person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.

Ohio Rev. Code § 147.541.

> The person taking an acknowledgment shall certify that:
>
> (A) The person acknowledging appeared before him and acknowledged he executed the instrument;
>
> (B) The person acknowledging was known to the person taking the acknowledgment, or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.

Ohio Rev. Code § 147.53.

"The formalities as to the execution are prescribed by statute, and cannot be dispensed with." *Dodd v. Bartholomew*, 44 Ohio St. 171, 176-77, 5 N.E. 866, 868 (1886). They exist "to prevent fraud and to provide reasonable assurance that the instrument is genuine." *Menninger v. First Franklin Fin. Corp. (In re Fryman)*, 314 B.R. 137, 138 (Bankr. S.D. Ohio 2004).

An improperly executed mortgage is not entitled to be recorded and, if such a mortgage is recorded, it is treated as though it had not been recorded. Accordingly, it is not deemed to provide constructive notice to a bona fide purchaser, and can be avoided by a bankruptcy trustee on that basis. *In re Burns*, 435 B.R. at 508. *See also Field v. Wheeler (In re Wheeler)*, No. 1:05CV805, 2006 WL 1645214, at *4 (S.D. Ohio June 12, 2006) (holding that the trustee could avoid the mortgage because "the invalidly executed mortgage does not provide constructive notice to bona fide purchasers.").

B. Relevant Law Concerning Defective Acknowledgments

In 1844, the Ohio Supreme Court held that a mortgage is invalid when the space provided for the mortgagor's name within the acknowledgment clause is left blank, and the acknowledgment clause contains no language from which it can otherwise be determined who made the acknowledgment. *Smith's Lessee v. Hunt*, 13 Ohio 260, 266-68 (Ohio 1844).

In *Dodd v. Bartholomew*, the Ohio Supreme Court examined an acknowledgment clause that contained errors in the grantors' names. A husband and wife, Charles A. Clark and Sarah Clark, executed a mortgage in which the acknowledgment clause incorrectly identified them as "Charles *B.* Clark and *Mary* Clark, his wife, the grantors in the above-named instrument" (emphasis added).

The court, noting that all parts of the document must be construed together, held that a certificate of acknowledgment that *incorrectly* identifies the mortgagor, but otherwise substantially complies with the statutory requirements, may be deemed valid if: (1) the error appears on the face of the mortgage; and (2) the mortgage itself supplies the means of making the correction. *See Dodd*, 44 Ohio St. at 175-76, 5 N.E. at 867.

The court upheld the validity of the mortgage because both requirements were met. In looking to see if the mortgage supplied the means of making the correction, the court referred back to the granting clause, which correctly identified the grantors as Charles A. Clark and Sarah Clark. The court further noted that the Clarks had signed their correct names to the instrument, thereby fixing their actual identity. The court found that, under these circumstances, "there is no want of certainty as to the grantors." *Id.* at 176, 5 N.E. at 868.

Relying on the "substantial compliance" rule established in *Dodd*, the United States Bankruptcy Court for the Southern District of Ohio has held that if the mortgagor's name is omitted from the acknowledgment clause, but the clause contains *other* language from which it can be determined who appeared before the notary to acknowledge the signing of the document, the mortgage is valid and cannot be avoided by the bankruptcy trustee. *See Drown v. Kondaur Capital Corp. (In re Amadu)*, 443 B.R. 145 (Bankr. S.D. Ohio 2010).

In *Amadu*, the acknowledgment clause did not include the name of the person who had appeared before the notary to execute the mortgage. It did, however, effectively identify that person by stating that the "above named MORTGAGOR" personally appeared and acknowledged that he signed the document. Adisa Amadu was clearly identified twice in the mortgage as the sole

"Mortgagor." Because the mortgage document itself supplied the means of correcting the deficiency, the court held that the acknowledgment clause substantially complied with the statutory requirements. *Id.* at 151-52.

C. Application

The acknowledgment clause in this case is not completely blank. Rather, it refers to "the above-named Mortgagor, Steven R. Cummings." Citing *Amadu*, the Bankruptcy Court conceded that the acknowledgment clause might be valid had it merely stated "the above-named Mortgagor." Under those circumstances, one could simply look back at the text of the Mortgage to determine that Linda J. Koogle was "the above-named Mortgagor."

At issue is whether the additional erroneous insertion of the name "Steven R. Cummings" renders the Mortgage invalid. The Bankruptcy Court noted that, in stark contrast to *Dodd*, where the names contained in the acknowledgment clause were at least *partially* correct, the name here was entirely different than the name of the Mortgagor identified elsewhere in the document. The Court found that this created a *contradiction* that was inherently confusing to anyone seeking to determine who had appeared before the notary public to acknowledge signing the Mortgage. Because the acknowledgment clause contained more than just a *minor variation* on Koogle's name, the Bankruptcy Court found that it did not substantially comply with Ohio's statutory requirements. As such, the Mortgage was invalid, and could be avoided by the bankruptcy trustee.

The Bankruptcy Court reasoned:

> Taken to its logical extreme, the rule that the City proposes – that any name within the acknowledgment clause is acceptable if the correct mortgagor is identified elsewhere in the mortgage – would eviscerate *Smith's Lessee* since there is no principled basis to distinguish a blank acknowledgment clause from a clause with a completely wrong name. This interpretation would effectively eliminate the acknowledgment clause altogether.

Decision at 12-13.

The City argues that the Bankruptcy Court erred in its interpretation and application of *Dodd*. According to the City, regardless of whether the name contained in the acknowledgment clause is *partially* wrong or *completely* wrong, the relevant question, under *Dodd*, is whether the error appears on the face of the mortgage, and, if so, whether the mortgage itself supplies the means of making the correction. *See Dodd*, 44 Ohio St. at 175-76, 5 N.E. at 867. The City notes that this rule is easily applied. In contrast, if the *severity* of the error determines the validity of the document, this leads to unpredictable results.

In this Court's view, the City's arguments have considerable merit. As previously noted, the statutory requirements exist to prevent fraud and to provide some assurance that the document at issue is genuine. In *Mid-American National Bank & Trust Co. v. Gymnastics International, Inc.*, 6 Ohio App.3d 11, 451 N.E.2d 1243 (Ohio Ct. App. 1982), the court noted that in interpreting a certificate of acknowledgment, one may refer to any part of the accompanying document. If, from the face of the document, "there is no doubt as to what was done, which was in accordance with the requirements of the statute, the acknowledgement should be held valid." *Id.* at 13, 451 N.E.2d at 1245 (quoting 7 *Thompson on Real Property* (1962) 611, Section 3314).

In this case, for reasons discussed in greater detail below, viewing the Mortgage as a whole, there can be no doubt that Linda J. Koogle appeared before Caslin, a notary public, and acknowledged the signing of the document in accordance with the requirements of the statute. Therefore, despite the substitution of Cummings' name in the certificate of acknowledgment, the Mortgage substantially complies with Ohio law.

The Court agrees that the severity of the error in the certificate of acknowledgment is not determinative. As the City notes, the name listed will either be right or it will be wrong. Any error, no matter how small, creates some degree of confusion. Admittedly, a completely wrong name may create greater confusion than a name that is only partially wrong. Nevertheless, under the "substantial compliance" rule set forth in *Dodd*, the document may still be deemed valid if the mortgage itself supplies the means of making the correction.

Here, the first prong of *Dodd* is easily satisfied. There can be no question that the error appears on the face of the Mortgage. Steven R. Cummings is not "the above-named Mortgagor." In fact, he is mentioned nowhere in the Mortgage itself and did not sign the document. This is obviously an instance where the text of the acknowledgment clause was copied and pasted from another document, but the name was not changed.

The second prong of *Dodd* is also satisfied because the Mortgage itself supplies the means of making the necessary correction. As an initial matter, the Court notes that the City presented Constance Caslin's affidavit, in which she states that: (1) Linda Koogle personally appeared before her and acknowledged her signature; and (2) Steven R. Cummings was not present when the Mortgage was signed and did not acknowledge signing the Mortgage. In addition, the parties stipulated that Linda Koogle signed the Mortgage and that Caslin witnessed her signature.

The Bankruptcy Court correctly excluded this evidence from consideration. Extrinsic evidence cannot be used to make corrections to a defective mortgage. Rather "the corrective language or the means of making the correction [must] be found within the Mortgage document itself." *Stubbins v. Espenschied (In re Espenschied)*, No. 08-52928, 2010 Bankr. LEXIS 2471, at *13 (Bankr. S.D. Ohio March 16, 2010). *See also Terlecky v. Chase Home Finance, LLC (In re Sauer)*, 417 B.R. 523, 535 (Bankr. S.D. Ohio 2009) (holding that because the notary's affidavit was "extrinsic to the Mortgage, it cannot be considered competent evidence of proper acknowledgment or certification under controlling Ohio law.").

In this case, extrinsic evidence is not necessary, because the Mortgage itself supplies the means of correcting the error. For the following reasons, it can easily be determined, by looking at the "four corners" of the document, that it was, in fact, Koogle who personally appeared before Caslin to acknowledge the signing of the Mortgage.

First, and perhaps most significantly, the acknowledgment clause specifically refers to "the above-named Mortgagor." As the court found in *Dodd*, the inclusion of this language specifically invites, and allows, the reader to look back at the text of the document to determine who that person is. *See Dodd*, 44 Ohio St. at 176, 5 N.E. at 868 (holding that even though the names listed in the acknowledgment clause were incorrect, they were followed by the phrase, "the grantors in the above-named instrument," which allowed the court to look at the text of the instrument to see who the grantors actually were). *See also In re Amadu*, 443 B.R. at 152 (holding that the omission of the mortgagor's name in the acknowledgment clause did not render the mortgage invalid since the clause referred to "the above named MORTGAGOR," whose identity could be conclusively determined from the text of the document).

In this case, there is no doubt that the "above-named Mortgagor" was Linda J. Koogle. She is clearly identified as the sole "Mortgagor" in the first line of the document. Moreover, it is clear from the face of the document that she is the person who signed the Mortgage. Her signature further fixes her identity as the Mortgagor, and erases any doubt as to who the "above-named Mortgagor" actually is. *See Dodd*, 44 Ohio St. at 176, 5 N.E. at 868.

In the Court's view, the significance of the inclusion of the phrase "the above-named Mortgagor," within the certificate of acknowledgment, cannot be overstated. If the acknowledgment clause had simply stated that Steven R. Cummings had personally appeared before Caslin and acknowledged the signing of the Mortgage to be his voluntary act for the purposes expressed therein, the Court agrees with the Bankruptcy Court that this would be akin to a complete omission and the mortgage would be invalid. *See Smith's Lessee*, 13 Ohio 260, 266-68. Although Cummings' name appears in the certificate of acknowledgement, it appears nowhere else in the Mortgage and he did not sign the document.

As the Bankruptcy Court noted, the rule is not "that any name within the acknowledgment clause is acceptable if the correct mortgagor is identified elsewhere in the mortgage." Decision at 12. *See also Gregory v. Ocwen Fed. Bank (In re Biggs)*, 377 F.3d 515, 520 (6th Cir. 2004) ("To permit the names in the deed of trust to satisfy the names-in-the-acknowledgment requirement is to eliminate the acknowledgment requirement.").

The crucial distinguishing factor in this case is that the certificate of acknowledgment also contains the phrase, "the above-named Mortgagor." Even though the certificate incorrectly states that Steven R. Cummings was "the above-named Mortgagor," anyone looking at the document as a whole would be able to determine that this was a mistake, and that Linda J. Koogle was, in fact, "the above-named Mortgagor."

As one bankruptcy court has noted, "while it is perhaps true that listing a completely different name for the mortgagor might be even more confusing than a blank acknowledgment clause, the Supreme Court of Ohio found that an erroneous name that allows an identification of the mortgagor can be in substantial compliance with Ohio law depending on the extent of the mistake." *In re Burns*, 435 B.R. at 512 (citing *Dodd*, 44 Ohio St. 171, 5 N.E. 866)).

Where, as here, the acknowledgment clause provides additional information concerning the person acknowledging the signature, allowing that name to be compared to the text of the mortgage itself, one can determine the true identity of the person who appeared to acknowledge the signature. *Id. See also Administrator of Veterans Affairs v. City Loan Company*, No. 17-83-12, 1985 WL 9128, at *3 (Ohio Ct. App. May 7, 1985) (holding that a certificate of acknowledgment that referred to "the above-named mortgagor," but then mistakenly listed the name of the mortgagee, substantially complied with the statutory requirements).[1]

In addition to the fact that the certificate of acknowledgment refers to "the above-named Mortgagor," identified in the Mortgage as Linda J. Koogle, and the fact that Koogle signed the Mortgage, further fixing her identity as the Mortgagor, the Court also finds it significant that Caslin, the notary public, also served as a witness to Koogle's execution of the Mortgage. As the court noted in *Menninger v. First Franklin Financial Corp. (In re Fryman)*, 314 B.R. 137, 139 (Bank. S.D. Ohio 2004), where one of the witnesses also served as the notary and the witnessing of the mortgage was not challenged, "[i]t would be inconsistent to 'discredit' the notary's acknowledgment when the notary's witnessing is accepted to have been proper."

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[1] In contrast, in *Espenscheid*, the acknowledgment clause did not contain the debtor's name, nor any phrase directing the reader to the text of the document. It simply referred to "the individual(s) who executed the forgoing instrument." Because there was "no language in the document to indicate that the Debtor appeared before a notary and acknowledged that he signed the Mortgage," the court found that the mortgage did not substantially comply with the statutory requirements, and could be avoided by the bankruptcy trustee. *See* 2010 Bankr. LEXIS 2471, at *19.

The Bankruptcy Court distinguished *Fryman*, reasoning that the problem did not lie with Caslin's acknowledgment, but with her faulty certification. The relevant question, however, is whether Koogle personally appeared before Caslin, a notary public, to acknowledge the signing of the document. The fact that Caslin was present as a *witness* when Koogle signed the document certainly lends credence to the fact that Koogle, not Cummings, personally appeared to acknowledge signing the Mortgage.

Under the circumstances presented here, even though the name listed in the acknowledgment clause is *completely* wrong, the Court finds that the acknowledgment clause substantially complies with the statutory requirements. The nature of the error is obvious and, for the reasons set forth above, the Mortgage itself supplies the means of correcting the error.

Viewing the document as a whole, there is no doubt as to what was done. It is clear that Linda J. Koogle, rather than Steven R. Cummings, signed the Mortgage and personally appeared before Constance Caslin to acknowledge the signing of the same, as evidenced by Caslin's signature and notarial seal. Because the Mortgage substantially complies with the statutory requirements, it must be deemed valid and enforceable. *See Gymnastics International,* 6 Ohio App.3d at 13, 451 N.E.2d at 1245.

One final note. The Trustee appears to argue that a finding of substantial compliance may bind the *parties* to the agreement, but it does not necessarily affect his ability, as a *bankruptcy trustee*, to avoid the Mortgage under § 544 (a)(3). Not surprisingly, he cites no authority for this proposition. Ohio law is clear that if a Mortgage is deemed to be in substantial compliance with the statutory requirements, it cannot be avoided by the bankruptcy trustee under § 544(a)(3). *See, e.g.*, *In re Amadu*, 443 B.R. at 153; *In re Wheeler*, 2005 WL 4057841, at *5.

Moreover, the error in this case is so obvious that no third party purchaser could legitimately claim to be misled as to who acknowledged execution of the Mortgage. Because the Mortgage substantially complies with Ohio's statutory requirements, it is deemed to have been properly recorded and to give any subsequent purchaser notice of the City's security interest in the property. Therefore, it is not subject to avoidance by the bankruptcy trustee.

IV. Conclusion

For the forgoing reasons, the ruling of the Bankruptcy Court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

The captioned appeal is hereby ordered terminated from the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton. Of course, the underlying matter from which the appeal was taken remains pending on the docket of the United States Bankruptcy Court for the Southern District of Ohio.

Date: February 19, 2013

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

Copies to: Attorneys of Record
Clerk of Court, United States Bankruptcy Court
for the Southern District of Ohio